

fides of such job criteria, they have in this proceeding somehow been transmuted into an indicator of discriminatory intent. After an extensive investigation and hearing, however, there has been no indication of a racially discriminatory act, much less an act that had a discriminatory intent behind it. Since the Church demonstrated at hearing that it was told by the expert advertising agency CMBS that classical music experience was a valuable job qualification for certain of its employees, and, more importantly, that there is no evidence that any minority applicant was ever turned away or in any way discouraged from applying at KFUE-FM because of a lack of classical music expertise,^{56/} it is clear that it was never used as a pretext to discriminate.

176. In fact, given the NAACP's statement that African-Americans are as likely as non-minorities to have classical music experience (a point with which the Church has never

^{56/} Amazingly, at the same time the HDO appears concerned that the criteria "classical music experience" might be used to dissuade minority job applicants, it complains that a recruitment letter sent out to minority and other referral sources failed to mention that requirement. HDO, 9 FCC Rcd at 925. Obviously, if KFUE-FM believed that minorities disproportionately lacked knowledge of classical music and intended to dissuade minority applicants, it would have included that criteria in the recruitment letter. Instead, KFUE-FM sought in good faith to locate a broad pool of minority applicants from which to choose. Moreover, since the letter referred to in the HDO was not about any specific job opening, it would not have made sense to include a classical music requirement that would not have been applicable to a number of positions at KFUE-FM.

disagreed),^{57/} it would be impossible for a classical music experience requirement to even be used in a discriminatory manner, much less to be "inherently discriminatory," since its use, whether justifiable or not, would not have a disproportionate impact upon minorities.

177. The HDO, in alleging that a classical music experience job requirement is "inherently discriminatory," appears to itself be relying on an unsupported racial stereotype (with which both the Church and the NAACP disagree) to the effect that minorities are less interested in classical music than non-minorities and that a classical music experience requirement would therefore have a disproportionate impact upon minorities. Given such a faulty premise, the allegation that the job requirement is inherently discriminatory collapses when viewed in the light of day.

178. Even if Arnold & Porter had made an argument on behalf of the Church based on the same faulty logic utilized in the HDO (i.e., any lack of minorities at a classical music station should be excused because minorities are not interested in classical music), such an argument could not be used to bootstrap allegations of discrimination on the theory that it demonstrates

^{57/} Despite claims to the contrary by the NAACP, Arnold & Porter never asserted on behalf of the Church that African-Americans are less likely than others to have classical music experience. In the February 23, 1990 "Opposition to Petition to Deny and Response to Inquiry," Arnold & Porter merely intended to note that the total number of minorities with classical music experience is limited given that, for both the general labor force and the minority labor force, classical music experience can be found in only a small subset of the labor force. See id. at 10-11.

a discriminatory mindset on the part of the licensee. Just last year, in response to such an argument by the NAACP, the Commission specifically rejected the contention that it should analyze an EEO defense concerning the availability of minority applicants to determine whether it was indicative of a discriminatory mindset on the part of the licensee. License Renewal Applications of Pasco Pinellas Broadcasting Co., 8 FCC Rcd 398, 399 (1993), aff'd, 24 F.3d 271 (D.C. Cir. 1994) ("Pasco Pinellas").

179. When the NAACP again raised the issue in an appeal of Pasco Pinellas, the Court of Appeals for the D.C. Circuit agreed with the Commission, responding simply that "[w]e do not understand petitioners' argument. . . . The [licensee] was only submitting an explanation to meet the inference of discrimination that petitioners sought to draw from the statistics." Florida State Conference of Branches of the NAACP v. FCC, 24 F.3d 271, 274 (D.C. Cir. 1994). Such a defense has been raised by licensees in over a dozen other EEO proceedings,^{58/} and in none

^{58/} See, e.g., Sun Mountain Broadcasting, Inc., 9 FCC Rcd 2124, 2126, 2126 n.11 (1994) (where licensee argued that only 52% of Hispanics aged 25 or older have the high school diploma required for most jobs at the station, no discriminatory intent issue raised with regard to that argument and license renewal granted without hearing); San Luis Obispo Limited Partnership, 9 FCC Rcd 894, 903, 903 n.20 (1994) (where licensee argued that local minorities frequently were not fluent in English, educated through high school or were otherwise untrained due to their background in agriculture, no discriminatory intent issue raised with regard to that argument and license renewal granted without hearing); Gulf-California Broadcast Co., 8 FCC Rcd 417, 418 (1993) (where licensee sought reduction of forfeiture on the grounds that few minorities in its market had the requisite skills for
(continued...)

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broadcast employment, no discriminatory intent issue raised and Commission denied request for reduction on the grounds that licensee's own employment of minorities demonstrated their availability); Goodrich Broadcasting, Inc., 7 FCC Rcd 6655, 6657, 6658 (1992) (where one licensee argued that area minorities took jobs in nearby large market where pay was higher and another argued that minorities took jobs in local defense industry where pay was higher and educational requirements lower, no discriminatory intent issue raised with regard to those arguments and license renewals granted without hearing); Ogden Broadcasting of South Carolina, Inc., 7 FCC Rcd 1895, 1895 (1992) (where licensee argued that relevant labor force included only two minorities because only two minorities were currently employed in upper-level radio positions in county, Commission denied reduction of forfeiture but raised no discriminatory intent issue regarding the argument); Letter to Michael D. Levine, 6 FCC Rcd 855, 855 (1991) (where licensee argued that it could not recruit minorities because it is located in a small, rural community with an agricultural economy, no discriminatory intent issue raised with regard to that argument and license renewal granted without hearing); Applications of Certain Broadcast Stations Serving Communities in the Sarasota, Florida Area and Other Florida Communities, 5 FCC Rcd 5683, 5684 (1990), recon. denied, 7 FCC Rcd 6045 (1992), 8 FCC Rcd 4223 (1993), appeal pending, No. 92-1546 (D.C. Cir.) (where licensee argued that on-air advertisements did not attract minority applicants because Blacks did not listen to the station, Commission found that argument did not evidence stereotypical view of minorities and granted license renewal without hearing); Winfas, Inc., 5 FCC Rcd 4902, 4902-03, 4904-05 (1990) (where one licensee argued that country and western format of station affected station's ability to attract minority applicants and another argued that availability of textile jobs locally impacted likelihood of employing minorities at station, no discriminatory intent issue raised regarding those defenses and license renewals granted without hearing); Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area, 5 FCC Rcd 4893, 4895 n.16 (1990), recon. denied, 8 FCC Rcd 398 (1993) (where licensee argued that country and western format of station affected station's ability to attract minority applicants, no discriminatory intent issue raised with regard to that argument and license renewal granted without hearing); Delaware Broadcasting Co., 102 F.C.C.2d 133, 136 n.6 (1985) (where licensee argued that small number of minority referrals was due to country and western format, Commission was "unconvinced" that format was cause but found no reason
(continued...))

of these cases has the FCC ever even questioned the appropriateness of making such a defense, much less found that it indicated a discriminatory mindset. In fact, when the Commission revised its EEO processing guidelines in 1980, the Commission itself stated that if a broadcaster's minority hires were low,

[t]he Commission will, in its in-depth reviews, take cognizance of a licensee's inability to employ women or minorities in positions for which the licensee documents that only a very limited number of women or minority group members have the requisite skills. The licensee should show in its EEO

^{58/} (...continued)

for a hearing on the station's EEO performance); Applications of Certain Broadcast Stations Serving Communities in the States of Louisiana and Mississippi, 94 F.C.C.2d 275, 283, 287 (1983) (where two radio station licensees argued that few Black men want to work for country and western stations and that Black interns prefer to work at television stations, no discriminatory intent issue raised regarding these arguments and license renewals granted without hearing); Provident Broadcasting Co., 91 F.C.C.2d 1247, 1248-49, 1248 n.3 (1982) (where all Blacks except one left station after format change from a Black to a "live uncanned country" format, Commission found no substantial and material question of fact and that renewal grant would serve the public interest); Voice of Charlotte Broadcasting Co., 77 F.C.C.2d 299, 300 (1980) (where licensee argued that absence of Blacks at station was due to its "'highly' stylized (rock, jazz and classical)" format, no discriminatory intent issue raised with regard to that argument and license renewal granted without hearing); License Renewal Applications of Certain Suburban Broadcast Stations Serving the Washington, D.C. Market, 77 F.C.C.2d 911, 918, recon. denied, 83 F.C.C.2d 207 (1980) (where licensee argued that country format of station made Black applicants unavailable, no discriminatory intent issue raised with regard to that argument and license renewal granted without hearing); Inquiry Into the Employment Policies and Practices of Certain Broadcast Stations Located in Florida, 44 F.C.C.2d 735, 738, recon. denied, 48 F.C.C.2d 666 (1974) (where several licensees argued that minority applicants were not "interested" in the stations' country and western formats, no discriminatory intent issue raised with regard to that argument and license renewals granted without hearing).

program that the skills are in fact required, and provide Census or similar data indicating that, as to women or minorities, individuals possessing these skills are as yet in short supply.

Equal Employment Opportunity Processing Guideline Modifications for Broadcast Renewal Applicants, 79 F.C.C.2d 922, 932 (1980).

Whether or not the Commission accepts such a defense on the merits, it cannot fault a licensee for making the very argument that the Commission invited licensees to make.

180. As is abundantly clear from the record, the Church and KFUD's personnel have never engaged in any form of racial discrimination at the Stations, nor have they ever harbored any discriminatory intent in any KFUD employment decision. The fact that an argument was made to the Commission about KFUD-FM's need for certain employees to have classical music experience does not change that fact. Like the licensee in Pasco Pinellas, the Church was "only submitting an explanation to meet the inference of discrimination that petitioners sought to draw from the statistics." Florida State Conference of Branches of the NAACP, 24 F.3d at 274. Thus, even if the Church had made the argument that the NAACP has alleged, that would be no basis for finding discriminatory intent on the part of the Church. There is therefore no basis for finding that KFUD engaged in discrimination and the affirmative action/non-discrimination issue must be resolved in KFUD's favor.

C. MISREPRESENTATION/LACK OF CANDOR ISSUE

181. The HDO designated a misrepresentation/lack of candor issue against the Church alleging that information supplied by the Church in response to Commission inquiries varied somewhat from the information supplied in its license renewal applications. The Church has, however, always provided what has been requested of it, and, with the exception of a few errors that were both inadvertent and insignificant, the information has been accurate. Given the sheer volume of material that has been submitted by the Church at the Commission's request, that is a respectable record.

182. The HDO appears to focus on two pieces of information with regard to the misrepresentation/lack of candor issue. First, it (somewhat) correctly notes that, in the renewal applications, the total number of hires for the twelve months prior to the filing of the renewal applications varies from the information submitted in response to a Commission letter requesting information on the last three years of hires. As is explained below, a discrepancy does exist between those two documents, but it is only half the size indicated in the HDO and was the result of a station employee innocently misinterpreting the Commission's two differing requests for information. The record is clear that the mistake was inadvertent and was not made with an intent to deceive.

183. Second, the HDO complains that information regarding job requirements for certain jobs as well as KFUD's training

relationship with Concordia Seminary was not disclosed in the renewal applications and/or was not accurate when it was disclosed. As to disclosure, none of the information at issue is requested in the renewal application nor is it normally included in a renewal application. Thus, there was no lack of candor on the part of the Church and certainly no intent to conceal such tangentially relevant information. As to the accuracy of this information, the record establishes conclusively that the information submitted by the Church is not misleading.

184. When reviewing allegations of misrepresentation, it is hornbook law that:

A necessary element in misrepresentation is wilfulness. Bluegrass Broadcasting Co., 43 F.C.C.2d 990, 993 (1973). Carelessness, exaggeration or slipshoddiness, which lack that necessary element, do not constitute misrepresentation. John C. Roach, 43 F.C.C.2d 685, 689 (Rev. Bd. 1973).

F.B.C. Inc., 3 FCC Rcd 4595, 4597 (M.M. Bur. 1988). The mere existence of an error without intent to deceive does not constitute misrepresentation.^{59/} In the present case, the

^{59/} Safe Broadcasting Corp., 6 FCC Rcd 6548, 6549-50 (Rev. Bd. 1991), recon. denied, 7 FCC Rcd 3440, 7 FCC Rcd 7588 (1992) (where photocopy of preceding quarter's quarterly issues/programs list was used as basis for preparing next quarterly issues/programs list, repeated references to discontinued programs were inadvertent errors and were not intended to deceive Commission or public into believing that programs remained on air and thus did not constitute misrepresentations); Chief Washakie TV, 46 R.R.2d 1594, 1597 (1980) (where ownership information regarding several of applicant's other business interests was inaccurately put forth on assignment application, "mere existence of an inaccuracy in an application, without any indication that the applicant meant to deceive the Commission, does not elevate such a mistake to the level of an intentional

(continued...)

Church's evidence regarding its lack of intent to deceive the Commission is un rebutted and dispositive.

185. Moreover, a high degree of proof is required in matters relating to misrepresentation. To even add the issue in a hearing proceeding, misrepresentation must be shown by evidence that is "clear, precise and indubitable." Riverside Broadcasting Co., 56 R.R.2d 618, 620 (1984) (citing Overmyer Communications, Co., 56 F.C.C.2d 918, 925 (1974), quoting Mammoth Oil v. United States, 275 U.S. 13, 52 (1927)); see also Scott & Davis Enterprises, Inc., 88 F.C.C.2d 1090, 1099 (Rev. Bd. 1982) ("Misrepresentation and lack of candor charges are very grave matters. They ought not be bandied about. The duty to come forward with a prima facie showing of deception is particularly strong where a misrepresentation issue is sought."). Where any doubt remains, the Commission has resolved issues of misrepresentation in favor of the applicant and against a finding of misrepresentation. See Grenco, Inc., 39 F.C.C.2d 732, 736-37 (1973) ("[W]hile we have no hesitancy in resolving the issue . . . it behooves us, of course, to do so with full awareness of the drastic consequences of an adverse ruling.").

186. As is discussed herein, no evidence of an intent to deceive has been presented in this case, much less the type of conclusive evidence necessary for such a serious finding as misrepresentation or lack of candor. Lacking any such evidence

^{59/} (...continued)

falsehood or otherwise raise a question of fact that must be resolved in an evidentiary hearing.").

of deceptive intent, no misrepresentation or lack of candor can be found and the issue must be resolved in the Church's favor.

1. **The Number of Hires Listed in the Renewal Applications Was the Result of an Innocent Error With No Intent to Deceive**

187. The HDO's designation of a misrepresentation/lack of candor issue stems primarily from a reporting error in the Church's renewal applications regarding the number of hires at KFUD. The mistake came to light when the number given in the renewal applications regarding the total hires over the twelve-month period preceding the filing of the renewal applications was cross-referenced by FCC staff with the Church's response to the Commission's first letter of inquiry, which had asked for information regarding the last three years of hires. Specifically, the HDO frames the issue in this manner:

In response to our question regarding the number of total hires (full-time and part-time) during the 12 months preceding renewal, the licensee responded (in renewal applications which were signed by the president of the licensee organization, The Lutheran Church/Missouri Synod) that it hired six persons. It repeated that representation some three months later in its renewal supplement. Then, after the Commission questioned the licensee about its specific recruitment and hiring efforts during the license term, the licensee provided new information which indicated hires more than twice the number originally reported. However, KFUD/KFUD-FM neither specifically addressed its earlier misstatements nor offered any explanation for the material change in information submitted.

HDO, 9 FCC Rcd at 924. Stated succinctly, the Church never explained the "discrepancy" because it was not aware there was a

discrepancy. The Church believed (with some justification) that the question in the renewal application asked for entirely different information than was requested in the Commission's first letter of inquiry several months later. Unlike the renewal applications, which asked only for "total hires" over a twelve-month period, the letter of inquiry specifically asked for information regarding "each position filled," and its "full or part-time status" for a three year period. (See M.M. Bur. Ex. 4). As a result, there was no reason to compare the two documents or to be surprised that they contained different information.^{60/}

188. The record establishes that Paula Zika, the employee who provided the employment data included in the renewal applications, understood the application to be asking only for hiring information that affected the Stations' employment profile

^{60/} Other licensees responding to Commission letters of inquiry have believed that they were being asked for different information than they previously supplied to the Commission and they therefore did not compare the information or otherwise look for or explain away "inconsistencies." Such errors were not found to constitute misrepresentation. See, e.g., Metroplex Communications, Inc., FCC 85D-74 (ALJ December 20, 1985), at 35-37, 42 (no misrepresentation found where, in response to letters of inquiry, applicant's agent felt that "some of the questions seemed confusing and he could not understand their purpose" and neither the applicant nor its attorney believed that the letter of inquiry requested information that should be compared against and made consistent with previous filings); Metrogeneral Communications of Nashville, Inc., 99 F.C.C.2d 256, 260 (1984) (no misrepresentation found where "the licensee did not provide job titles, nor did it explain why its EEO program data on job hires does not correspond with its license term list of hires. Neither has the licensee explained why its opposition pleading's claims concerning internships were not corroborated by its license term list of interns.").

at the time of the renewal application filing. She therefore only reported hires in which the hiree remained employed at the Stations at the time of the renewal filing, reasoning that the Stations could not claim credit for hiring employees that had already left and therefore were not part of the current EEO profile of KFUO's staff. Ms. Zika also included only full-time hires since the renewal application did not specifically ask about part-timers and, given the fact that most part-time employees at the Stations were students working only six to twelve hours per week, she did not think of them as being important to the Stations' employment profile.

189. In point of fact, the Form 396 does not specify whether or not part-time employees should be included in calculating hires. (See Church Ex. 9). It therefore varies from licensee to licensee as to whether part-timers are included in the hiring statistics. To the extent the FCC Form 396 provides any guidance at all, it appears to indicate that only full-time hires are relevant, since a licensee is required to complete the form only if it employs five or more "full-time employees." (See Church Ex. 9).

190. Moreover, the Commission has been somewhat ambiguous on whether part-timers are relevant to a station's EEO profile. Earlier this year, the Commission noted that "[t]he Commission's primary EEO enforcement policies focus on minorities and women employed on a full-time basis" and the Commission has suggested eliminating all record keeping requirements for part-time hires. Implementation of Commission's Equal Employment Opportunity

Rules, Notice of Inquiry, 9 FCC Rcd 2047, 2050 (1994). In fact, where a licensee has submitted part-time information in response to a Commission Letter of Inquiry, the Commission has specifically disregarded the part-time hires when analyzing the EEO program. Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area, 5 FCC Rcd 4893, 4901 n.24 (1990), recon. denied, 8 FCC Rcd 398, 8 FCC Rcd 603 (1992), 8 FCC Rcd 3933 (1993). Given the ambiguous nature of the question asked, as well as the Commission's minimal interest in part-time employees (particularly of the 6-12 hour per week variety), Paula Zika's failure to list part-time employees was neither unreasonable nor significant.

191. Because KFUE's renewal applications do not and were never intended to discuss part-time employees, Ms. Zika did not include in her "hires" count the four part-time employees hired during that particular twelve-month period. Thus, even if she had correctly interpreted the question in terms of counting employees that had already left the Stations, the number she would have placed in the renewal application would have been ten -- the number of full-time hires -- rather than the fourteen asserted in the HDO. Thus, the question actually raised in the HDO is whether the employee sought to mislead the Commission by putting "six" as the number of total hires rather than "ten."

192. The record is clear that regardless of her reason for not counting certain employees in tallying employee hires for the renewal applications, Ms. Zika had no intent to mislead the Commission, and her inadvertent error is just that -- an

inadvertent error.^{61/} Moreover, given the small numeric

^{61/} The Commission has often discovered that what is designated for hearing as a misrepresentation/lack of candor issue is often just a matter of simple human error. For example, in Metroplex Communications, Inc., FCC 85D-74 (ALJ December 20, 1985), the renewal application was prepared by the station's new general manager who had never prepared a renewal application before but neither requested nor received any assistance from the station's owners, who were longtime broadcasters. In completing the Model EEO program, the general manager made several errors of interpretation, understanding, and mathematics. Specifically, the general manager understood the form to request only information on full-time employees and to request only the total number of women and minorities hired and promoted at the station rather than the total number of all employees hired and promoted. By reporting only female and minority hires, the percentage of hires and promotions involving minorities was artificially inflated.

In addition, erroneously believing he needed to include hiring information for the entire time period Metroplex had owned the station, including hires from the previous license term, the general manager asked the Business Manager and the Program Director to supply him with a list of the women and minorities hired during Metroplex's ownership of the station. In transferring this information to the form, the general manager miscounted the number of minorities hired and reported 17 when 18 had in fact been hired. Also, he transposed the number of women hired and reported 23 rather than 32. In addition, the general manager included as promotions individuals who had not changed job positions or been given a salary raise.

Responses to two letters of inquiry from the Commission revealed numerous inconsistencies among the station's renewal application, Annual Employment reports, and pleadings in response to a petition to deny. After a full hearing with regard to these issues, the Administrative Law Judge found that:

[T]he erroneous and incorrect information found in the renewal application and the inconsistent statements submitted in response to Commission inquiries relating to promotions, hiring figures, and recruitment sources, was, for the most part, the product of simple mistakes and lack of proper licensee attention. They do not represent instances of deliberate misrepresentation

(continued...)

difference -- six versus ten -- the Church's President would have had no reason to suspect an error when certifying the renewal applications.^{62/}

193. Providing further evidence that there was no intent to mislead the Commission is the fact that neither the employee nor the Church had any reason to submit the erroneous number. As the Commission stated in Metrogeneral Communications of Nashville, Inc., 99 F.C.C.2d 256 (1984):

^{61/}(...continued)

warranting denial of license renewal.

Id. at 77-78.

Likewise, in WXBM-FM, Inc., FCC 91D-63 (ALJ Dec. 16, 1991), the employee who prepared the Model EEO Program and the general manager who reviewed it each thought that it requested information regarding only the total number of women and minorities, not the total number of employees. In reviewing the error, the ALJ held that "the incorrect information reported in Section IV of the EEO program resulted from carelessness and faulty reasoning instead of an intent to deceive." Id. at 4.

^{62/} It also bears noting that the Church's reliance on its employee to assemble employee data is reasonable and acceptable. Ms. Zika was a longtime employee of the Stations, was responsible for keeping this information as part of her ordinary job duties, and was in a far better position than the Church's President to prepare it. Such reliance has previously been found reasonable. See Northern Television, Inc., 55 R.R.2d 1680, 1690 (1983) (applicant cannot document accuracy of figures submitted, but relies on them because they were provided by the accounting department); Metroplex Communications, Inc., FCC 85D-74 (ALJ Dec. 20, 1985), at 37 (principal who signed filing with Commission indicated he could not personally know the truth of the literally hundreds of factual assertions made in filing but relied on staff members and counsel in whom he had confidence); Buckley Broadcasting Corp. of California, 72 F.C.C.2d 326, 328 (1979) (applicant entitled to rely on employees' representations as to racial/ethnic classification).

Although the licensee's EEO submissions were inaccurate in a number of respects, we do not believe that the discrepancies raise a substantial question of fact regarding the licensee's candor. We note initially that the licensee's assertion concerning its erroneous EEO program job hire figures - that the errors were inadvertently made - is un rebutted. In addition, the magnitude of the error - seven hires actually made instead of the four reported - is not so great as to suggest a motive to deceive.

Id. at 260-61. In the present case, like Metrogeneral, the Church's evidence that the error was an honest mistake is un rebutted and the small numbers involved, ten versus six hires, do not provide the requisite motive.^{63/}

194. Moreover, it defies logic to believe that the Church would go to the trouble and risk of reporting a false number and then, in response to the first Commission letter of inquiry, volunteer information demonstrating that the original information was false. As the Commission stated in Emerald Broadcasting Co., 30 F.C.C.2d 879, 883 (1971), "[i]t is incredible to contend that [the licensee] would have sought to mislead the Commission on the

^{63/} If the Church had indicated that one of the hires was a minority, so that one of six hires (16.7%) rather than one of ten hires (10%) was a minority, then perhaps it might have had some incentive to use the lower number. But since KFUO had not had a full-time minority hire during that particular twelve-month period, it made no difference whether there had been six hires or ten hires. In either case, 0% of hires were minority, and misrepresenting the total number of hires would have no benefit to the licensee. See Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina, 5 FCC Rcd 1704, 1710 n.19 (1990), recon. denied, 7 FCC Rcd 1895 (1992).

one hand, and on the other, that [the licensee] would submit the very documents which would reveal its alleged deception."^{64/}

195. In short, the only question raised by the error in total hires in the renewal application is whether a simple error or misunderstanding of a Commission form reflects adversely on a licensee. Numerous cases indicate the answer is no.^{65/}

^{64/} The Commission has repeatedly confronted cases where an applicant provides the very evidence that demonstrates the applicant's error, and in those cases the Commission has found that it is unreasonable to conclude that the applicant engaged in intentional misrepresentation. See Dixie Broadcasting, Inc., FCC 93D-12 (ALJ July 7, 1993) at 18 ("It would have made no sense for [the witness] to have attempted to deceive the Commission by reporting only 20 hires, and then to have given up this ruse or changed his mind in January 1992 and reported that [the applicant] hired over five times that number. The surest way to have exposed deception was to have done what [the applicant] did. This scenario is completely inconsistent with an intent to mislead or deceive."); David A. Bayer, 7 FCC Rcd 5054, 5055 (1992) (where mistake in application resulted from misunderstanding of a technical requirement and information was later corrected in a subsequent pleading, no misrepresentation found); Benko Broadcasting Co., 3 FCC Rcd 6838, 6841 (Vid. Serv. Div. 1988) (where language in construction permit extension application erroneously indicated that certain construction had occurred, the fact that a picture of the construction was attached to the application and that it clearly demonstrated that the construction had not occurred, error was honest mistake made without intent to deceive); Radio, Inc., 43 R.R.2d 406, 409 (1978) (where existing licensee due reimbursement for expenses associated with change of frequency submitted lists of expenses and supporting documentation which were internally inconsistent, fact that errors were so readily apparent held to be "wholly inconsistent with an attempt to secure reimbursement for more than was expended.").

^{65/} Errors in understanding Commission forms occur regularly and, while certainly not encouraged, they are frequently acknowledged to be nothing more than the result of the introduction of the human factor into the Commission's application processes. See, e.g., National Capital Christian Broadcasting, Inc., 3 FCC Rcd 1919, 1919 n.6 (1988) (no intent to deceive found where applicant signed
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196. As to the reasonableness of the error made by the Church, a review of prior cases reveals that information errors are not infrequent on the Form 396, largely because of confusion regarding the FCC Form 396 itself, or difficulty in assembling and categorizing the information requested in that form.^{66/}

^{65/} (...continued)

Model EEO Program even though the Policy Dissemination and part of the Job Hires section were left blank due to a typographical error); Big Bend Broadcasters, 96 F.C.C.2d 175, 188 (ALJ 1983) (where applicant misunderstood question on application for new facility and failed to disclose broadcast interests of principal's son, no issue added); Radio Station WABZ, Inc., 90 F.C.C.2d 818, 821 (1982) (where applicant misinterpreted question on application for new facility regarding whether any party had any "connection with" another station to mean "ownership interest in" and therefore did not report principal's employment at a station, no misrepresentation found); Acadiana Broadcasting Co., 88 F.C.C.2d 367, 374 (ALJ 1981) (where applicant misunderstood information required by application form and failed to disclose existence of bank directorships and stockholdings of principals, error found to be inadvertent); Midwest Broadcasting Co., 70 F.C.C.2d 1506, 1534-45 (ALJ 1978), modified, 70 F.C.C.2d 1489 (Rev. Bd. 1979) (where comparative applicants' unfamiliarity regarding information required to be updated in an application and their miscommunications with counsel resulted in several misrepresentations regarding outside business involvements, local residence, and past broadcast experience, disqualification was not warranted); Azalea Corp., 47 F.C.C.2d 163, 177 (ALJ 1969), modified, 47 F.C.C.2d 151 (Rev. Bd. 1974) (where applicant for new facility misinterpreted question regarding applicant misconduct and did not report NLRB matter, failure to report was a reasonable misunderstanding of question). In sum, "[t]he Commission demands of its licensees and applicants absolute candor, but it cannot and does not expect infallibility." Claud M. Pettit, 58 F.C.C.2d 776, 778, recon. denied, 60 F.C.C.2d 1094 (1976), quoting Swanco Broadcasting, Inc., 40 F.C.C.2d 753, 755-56 (1973).

^{66/} The Commission has declined to add a misrepresentation or lack of candor issue in numerous cases where errors have been made and later explained. For example, in Metrogeneral Communications of Nashville, Inc., 99 F.C.C.2d 256 (1984), the licensee reported in its license renewal application
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Where, as is the case here, the record amply demonstrates that a reasonable mistake has occurred without any intent to deceive the Commission, the misrepresentation/lack of candor issue must be resolved in favor of the Church.

⁶⁶/ (...continued)

that it had hired four employees during the year. When the application was challenged, the licensee submitted a revised EEO program which also discussed an internship program in which the station participated. The licensee gave an estimate of ten as the number of interns in the program.

In response to a letter of inquiry, the licensee provided information regarding all hires and intern participants during the license term. This information revealed that seven, not four, hires had been made during the final year of the license term and that only six interns had participated in the intern program. In a second letter of inquiry, the licensee was asked to explain these discrepancies. The licensee could not offer any explanation other than inadvertence for incorrectly reporting the number of hires. With regard to the number of interns, the licensee indicated that its original estimate included interns who did not complete the program, while its response to the letter of inquiry only included those who had. Based on these explanations, the Commission found that there was no issue as to the licensee's candor. Id. at 261. See also Certain Broadcast Stations Serving Communities in the State of Arkansas, 6 FCC Rcd 4938, 4939 (1991) (despite the fact that six of the last seven Annual Employment Reports filed with the Commission were incorrect, no issue of lack of candor found to exist and license renewal application granted); David Coppock, 5 FCC Rcd 191, 191-92 (1989) (where license renewal applicant submitted inaccurate information as to number of hires and existence of staff cut-backs, and licensee, in response to letter of inquiry, stated that the information was supplied by a general manager no longer employed at the station who "simply did not appropriately review all the files before completing the renewal," no issue of misrepresentation found); Northern Television, Inc., 55 R.R.2d 1680, 1690 (1983) (where license renewal application stated that 26 minorities and 23 women were hired and 7 women were promoted, but response to later Commission inquiry revealed that only 5 minorities and 20 women had been hired and only 5 women had been promoted, no intent to deceive found or issue of candor designated where licensee had relied on numbers provided by its accounting department).

2. **The Statements in the KFUD Renewal Applications Regarding KFUD's EEO Program Were Complete and Accurate When the Forms Were Filled Out and Certified**

197. Although the portion of the HDO dedicated to the Misrepresentation/Lack of Candor Issue focuses largely on the mistake in the number of total hires given in the renewal applications, it also suggests that the Church may have misrepresented the nature of its EEO program. Specifically, the HDO states that

the licensee has been less than forthcoming in responses to inquiries regarding the specifics of its EEO outreach efforts. It appears that the licensee lacked candor in its representation of its recruitment program. In its renewal applications, the licensee stated that it recruited for vacancies as they occurred and that they actively sought female and minority referrals.

To the contrary, it appears that KFUD/KFUD-FM's license term recruitment efforts were severely limited.

HDO at 924 (emphasis added).^{67/}

198. As is demonstrated by the Church's Proposed Findings of Fact and by the comparison with the EEO programs of other stations made herein,^{68/} KFUD's EEO efforts during the License Term were significant and, at a minimum, substantially complied

^{67/} It should be noted that the Commission never requested recruitment information for hires at KFUD prior to October 1, 1986, and the Commission therefore only had recruitment information for less than half of the KFUD License Term. At the time of the HDO, the Commission was therefore in no position to judge the adequacy of KFUD's "license term recruitment efforts."

^{68/} Supra at ¶¶ 169-71.

with the EEO Rule. This is particularly true given the King's Garden/Amos issue faced by KFUE.

199. Moreover, the Stations reasonably believed that the language in the renewal applications was accurate at the time it was written and certified. The form itself speaks to the present. Specifically, the renewal applications state:

When vacancies occur, it is the policy of KFUE and KFUE-FM to seek out qualified minority and female applicants. . . . We contact the various employment services and actively seek female and minority referrals and we specifically request them to provide us with qualified female and minority referrals.

(Church Ex. 4, Att. 16, p. 7). Whether or not the Commission is satisfied with the level of recruitment that occurred prior to KFUE intensifying its program in the latter part of the License Term in response to Commission rule changes has nothing to do with the fact that, at the time the renewal applications were certified, the Stations had a policy to seek out qualified minority and female applicants and referrals and reasonably believed that they were making significant efforts to do so. The renewal applications are therefore accurate in this regard.

200. Importantly, despite the unreasonable way in which this language was interpreted in the HDO, the renewal applications never said "for each job opening throughout the License Term, we have contacted . . ." because the Form 396 (which the renewal applications largely duplicate in a narrative form) does not ask about a station's recruitment policies throughout the term, only

its current policy.^{69/} The Church truthfully answered the

^{69/} Similarly, the HDO appears to fault KFUE for failing to mention its decades old, work/study training program with Concordia Seminary, or its Lutheran/classical music requirements for certain jobs. HDO, 9 FCC Rcd at 925. However, the Form 396 does not request information on whether a broadcast facility is being used for training purposes unless the training program is specially designed to train women and minorities, and even then, the provision of information on such a program is optional. In addition, as discussed at Note 53, supra, the Commission is "well and contentedly aware" of the use of broadcast facilities for training and does not discourage such use. The Church therefore had no reason to even think that such information would be of interest to the Commission.

Moreover, because the Equal Employment Opportunity Program included with the renewal applications discussed only full-time employees, there would have been no reason to mention the arrangement with Concordia Seminary regarding student employees working only 6-12 hours per week. Such an "omission" is not at all unreasonable given that "[t]he Commission's primary EEO enforcement policies focus on minorities and women employed on a full-time basis." Implementation of Commission's Equal Employment Opportunity Rules, Notice of Inquiry, 9 FCC Rcd 2047, 2050 (1994). Nor is the omission of a reference to such a part-time work/study program unreasonable given that the FCC Form 396 itself is oriented towards full-time employees, instructing stations that they need not provide any information at all regarding their employment practices unless they have five or more full-time employees. (See Church Ex. 9). Thus, but for the chance fact that KFUE employed five or more full-time employees, the Stations would not have even been filing the document that the HDO asserts should have discussed the part-time work/study program with Concordia Seminary. Given the FCC Form 396's focus on full-time employees, it is hardly surprising that the renewal applications did not discuss this part-time training program. More to the point, such an "omission" clearly does not rise to the level of a misrepresentation, nor does it demonstrate a lack of candor.

As for the Lutheran/classical music requirements for various jobs, again, the Form 396 does not request such information. In this vein, the Church notes that job requirements such as a bachelor's or postgraduate degree may, according to some, have a disproportionate impact upon minority job applicants, but the Form 396 has never requested information on such requirements from licensees, nor has the Commission ever apparently found such requirements to be an issue.

(continued...)

question asked, and there is neither a misrepresentation nor lack of candor in that.

3. **The Church's Statements Regarding a Desire for Classical Music Experience in Certain Job Positions Were True**

201. The last area in which the HDO suggests that misrepresentation or lack of candor may have occurred is the Church's statement to the Commission that it normally required classical music experience for its sales positions beginning with KFUD's hiring of its sales personnel in 1987. HDO, 9 FCC Rcd at 925. The basis of the Commission's concern appears to have been that during the investigatory phase of this proceeding, KFUD was only able to present documented evidence of classical music experience for a small number of its sales employees because most had long since left KFUD-FM and there was no reason for KFUD-FM to retain (or even collect in the first place) documentary evidence of each sales employee's classical music background. However, as was well documented in the record of the hearing, the Church was told by Peter Cleary, its classical music sales representative, that classical music experience in the station's

⁶⁹/ (...continued)

Similarly, the Church assumed that the Commission was aware of its long history as a religious broadcaster and would understand as a matter of course that it operated under the auspices of King's Garden and its progeny. Again, the Church is unaware that such a statement has normally been a part of the renewal applications filed by religious broadcasters and therefore did not include such a statement in its renewal applications. The form itself provides no guidance for religious broadcasters.

sales staff would be important for establishing the station in the St. Louis advertising market. More to the point, the record indicates that KFUD-FM took this advice to heart and sought to hire sales representatives who had classical music experience at least until the end of the License Term, when certain managers began to change their views about the appropriate criteria.

202. The HDO counters with the assertion that not every KFUD-FM sales employee had classical music experience. That is probably true. However, that does not change the fact that the Church sought out individuals with such experience. Given that KFUD-FM could only offer below-market levels of pay for such employees, it is not surprising that the station could not always be as selective as it would have liked and had to hire individuals who lacked such experience. That, along with the fact that numerous other KFUD job positions did not require classical music experience, is the reason why it made sense for the Church not to list classical music experience as a requirement in its general recruitment letter. The Church sought out the broadest possible pool of applicants and then hoped at least some of them, knowing KFUD-FM's format, would have classical music experience useful for sales positions. Where none did, depending on the urgency of the hire, the Church would have no choice but to hire the most qualified individual available, even if he or she did not have all of the qualifications that KFUD-FM was seeking. As Marcia Cranberg testified, the use of the word "requirement" was at most possibly

an "overstatement" to the extent it implied a fixed, immutable qualification. (Tr. 1027-28).

203. In this regard, the Church wishes to note that it was Richard Miller, the NAACP's witness on the proper way to conduct a broadcast EEO program in the St. Louis market, who defended his own station's EEO record before the Commission by noting that he failed to recruit for fourteen full-time positions because he needed to "hire individuals familiar with the station who could work effectively immediately." See Communications Fund, Inc., 7 FCC Rcd 8636, 8638 (1992). Despite the fact that Mr. Miller's EEO program was attacked in the very same petition to deny as KFUD, the Commission never questioned the accuracy of this incredibly specific and self-serving job requirement nor did it question Mr. Miller's need to hire people who had the background and experience to "work effectively immediately." Instead, despite Mr. Miller's failure to recruit for 15 of 28 full-time job openings, the Commission only admonished Mr. Miller's station and granted an unconditional renewal.^{20/}

204. It seems incredible that Mr. Miller's "urgency" rationale would be acceptable to the Commission as a reason for suspending a station's entire EEO program in violation of the EEO

^{20/} The Commission found that the licensee "generally complied with our EEO Rule and that unconditional grant of its renewal application would serve the public interest" because the licensee "contacted a number of recruitment sources, received Black referrals, interviewed Black applicants and hired Blacks for full-time vacancies." Communications Fund, Inc., 7 FCC Rcd 8636, 8638 (1992). KFUD did these things as well, and yet its renewal applications were designated for hearing on, inter alia, EEO performance grounds.